Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

LESLIE SUNDELL,

Petitioner,

-against-

CISCO SYSTEM, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court's dismissal of this Title VII case on a motion to transfer venue is proper in light of the fact that the lawsuit was filed in the proper district?

2. Whether the district court, in dismissing this Title VII case rather than transferring the case, abused its discretion when the interests of justice required that the case be tranferred?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in Fifth Circuit are:

1) Leslie Sundell, Plaintiff and Appellant below and certiorari before this Honorable Court;

2) Cisco Systems, Inc., a nonserved Defendant and Appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on March 20, 1997.

OPINIONS BELOW

The decision of the district court was not published. The decision of the court of appeals was not published.

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on March 20, 1997. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. section 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1404(a):

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

42 U.S.C. § 1404(b):

Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any

motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district.

42 U.S.C. § 1406(a):

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

42 U.S.C. § 2000e, et seq.:

For the purposes of this subchapter . . .

42 U.S.C. § 2000e-5(f)(3):

Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.

STATEMENT OF THE CASE

On October 15, 1996, Leslie Sundell brought suit, in the United States District Court for the Southern District of Texas – Galveston Division, asserting that her civil rights had been violated by the conduct of defendant, Cisco Systems, Inc., and its agents and assigns. Plaintiff/Petitioner's, Sundell's, lawsuit was brought under Title VII, 42 U.S.C. § 2000e, et seq. (as amended under the Civil Rights Act of 1991).

On October 18, 1996, prior to service or answer of the original complaint, Plaintiff/Petitioner filed a motion to transfer the case to the Houston Division of the Southern District of Texas. On October 25, 1996, the District Court denied Plaintiff/Petitioner's motion to transfer and dismissed the case without prejudice. The dismissal serves as a dismissal with prejudice because plaintiff's statutory rights terminated during the time the district court took the motion to transfer under advisement.

Plaintiff/Petitioner appealed the district court's decision to the Fifth Circuit. The Court of Appeals had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291 and Rule 4 of the Federal Rules of Appellate Procedure.

On March 20, 1997, the panel, consisting of Judges Jones, DeMoss, and Parker, affirmed the district court's decision, finding nothing in the record to indicate that the district court abused its discretion. The panel read § 1404(b) and § 1406(a) as giving the district court broad discretion to decide whether to dismiss a case which is filed in the wrong division or district or transfer the case

to a district or division in which it could have been properly brought.

REASONS FOR GRANTING THE WRIT

This case presents important issues as related to equal employment opportunity for women in this country and a need to clarify venue statutes under Title VII.

Leslie Sundell was victimized by the discriminatory employment practices of Cisco Systems, Inc. Sundell sought relief from the illegal acts by filing suit in the United States District Court for the Southern District of Texas – Galveston Division. Sex discrimination actions are not subject to the general venue statute, but are governed by Title VII's particularized venue provision which provides that venue is proper when the action is brought in *any judicial district court within the state* in which the illegal acts are alleged to have occurred. The specialized venue provision makes no differentiation between divisions within judicial districts.

Plaintiff/Petitioner sought to change venue to the Houston Division of the Southern District of Texas because the discriminatory practices occurred in Houston. The District Court erred in dismissing the case. Venue was proper in that the action was filed in the Southern District of Texas, a district where the unlawful employment practices were committed, namely, Houston, Texas. Even if the action was filed in the wrong division, the "interest of justice" was not met by dismissing the case. Nor was the interest of justice met by denying the motion to transfer.

The District Court denied Plaintiff's Motion to Transfer and dismissed the case stating "The Court absolutely refuses to waste anymore of the Clerk's time in this matter." (Tr. at Vol. 1 at page 18).

Plaintiff/Petitioner, Sundell, alleges that Defendant/Respondent, Cisco Systems, Inc., violated her employment rights under Title VII, 42 U.S.C. § 2000e, known also as the Civil Rights Act of 1991. Title VII has its own particularized venue provision which provides that an action may be brought:

> in *any judicial district* in the State in which the unlawful employment practices is alleged to have been committed, in the *judicial district* in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent had his principal office.

42 U.S.C. § 2000e-5(f)(3) (1988) (emphasis added)

Defendant/Respondent, Cisco Systems, Inc., hired Plaintiff/Petitioner, Sundell, as Regional Federal Account Manager and had her work out of the Clear Lake City office which is in Houston, Texas. Plaintiff/Petitioner complained that during the course of her employment she was treated disparately because of her sex. Plaintiff/Petitioner filed suit in the Southern District of Texas, the federal district where the disparate treatment occurred,

as Houston is within the Southern District. Therefore, venue was properly had in the Southern District.

It is clear that the Title VII venue statute speaks of districts, not divisions. Congress addressed the question of divisional venue by enacting 28 U.S.C. § 1393[1]. However, the statute was repealed in February of 1989. The repeal of § 1393 casts some doubt whether any vitality remains in the concept of divisional venue. *Jordon v. Bowman Apple Products, Co.*, 728 F.Supp. 409, 418 (W.D.Va. 1990). The district court in *Jordan* states "that the purpose in repealing § 1393 was not to prohibit divisional venue, but rather not to require it. Where divisional venue is mandated by local rule those mandates must be complied with[.]" *Id.* at 418-19. But if there is no local rule, venue need be set only on a district basis, disregarding divisions. David D. Siegel, *Commentary on 1988 repeal of §1393*, 28 U.S.C.A. § 1393 (1993), repealed by Pub. L. 100-702, Title X, § 1001(a), November 19, 1988, 102 Stat. 4664 (1993).

Moreover, a district court has held that a particularized venue provision will even operate to supersede venue provisions found in the local rules. In *Garus v. Rose Acre Farms, Inc.*, the district court determined that the sexual harassment action was not subject to the general venue statute, but was governed by Title VII's particularized venue provision. 839 F.Supp. 563, 566 (N.D.Ind. 1993). The district court also held that venue was proper

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[1] Section 1393(a) provided "except as otherwise provided, any civil action, not of a local nature, against a single defendant containing more than one division must be brought in the division where he resides."

in any federal district court within the state in which [the] alleged illegal acts occurred, and in *any division within [the] district* as established by local rules, regardless of the particular county in which [the] alleged acts of misconduct occurred. *Id.* (emphasis added). Despite the local rules placing venue in a different division, the district court determined that the particularized venue operated and would not draw distinctions between divisions. *Id.*

Because the Clear Lake City office of Defendant/Respondent is located within Houston, Harris County, it is included within the Houston Division of the Southern District. Although Plaintiff/Petitioner had intended to file the original complaint with the Houston Division because the discriminatory acts took place in the Clear Lake City office, the suit was mistakenly filed in the Galveston Division of the Southern District. Plaintiff/Petitioner could have prosecuted this Title VII lawsuit in the Galveston Division. However, Plaintiff/Petitioner moved to transfer the case for the convenience of the opposing party and the witnesses.

Petitioner filed the lawsuit with a district court within a proper judicial district where the illegal employment practices occurred. Divisional venue is not mandated by the local rules of the Southern District. Venue was proper because Title VII requires that venue need be set only on a district basis, disregarding divisions.

Assuming *arguendo* that venue was proper, then the Motion to Transfer was governed by the change of venue statute. 28 U.S.C. section 1404(a) provides, "for the convenience of parties and witnesses, in the interest of justice, a

district court may transfer any civil action to any other district or division where it might have been brought." 42 U.S.C. § 1404(b) provides that upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district.

Under § 1404, the district court had discretion to transfer the case to another division. The language does not allow for dismissal of the cases in the event that the motion is denied. Therefore, the District Court erred in dismissing the case and abused its discretion. Furthermore, the Court of Appeals erred in affirming the lower court's decision since it only concluded that the district court had not abused its discretion in applying § 1404(b) and § 1406(a). The Court of Appeals did not even address the issue of the venue statute of Title VII. Therefore, the Court of Appeals erred in not determining this issue.

Although Plaintiff/Petitioner believes that venue was proper, if this Honorable Court finds otherwise, Plaintiff/Petitioner submits that the "interest of justice" would not be served by allowing the case to be dismissed.

The statute governing the situation in which venue is improper states that "the district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 42 U.S.C. § 1406(a) (1988). The problem which gave rise to the enactment of this section was that of avoiding the injustice which had

often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962).

The facts found in *Goldlawr* are similar to those of the case at bar. In *Goldlawr*, this Court wrote that the case was a typical example of the problem sought to be avoided, for dismissal would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake . . . The language and history of 1406(a), both as originally enacted and as amended in 1949, show a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice. *Id.* This section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years in that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits. *Id.* at 466-67.

Decisions to effect a 1404 transfer are committed to the sound discretion of the transferring judge and review of a transfer is limited to abuse of that discretion. *Jarvis Christian College v. Exxon Corp.*, 845 F.2d 523, 528 (5th Cir. 1988).

A Title VII action must be brought within 90 days of receipt of an EEOC right-to-sue letter. *See* 42 U.S.C. § 2000e-5(f)(1) (1988). In instances where a complaint is timely filed and later dismissed, the timely filing of the complaint does not "toll" or suspend the 90-day limitations period. *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188,

1191 (5th Cir. 1992). When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. *Goldlawr*, 369 U.S. at 467. "The interest of justice" may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as "time-consuming and justice-defeating technicalities." *Id.*

Because the 90-day statute of limitations has expired, Petitioner is now time-barred from initiating another action for the sex discrimination that she suffered at the hands of Defendant/Respondent. Neither Plaintiff/Petitioner nor Plaintiff/Petitioner's Counsel had any intention of inconveniencing or causing the unnecessary use of any of the Division Court's resources. The filing of the suit in the Galveston District was simply a clerical error which Plaintiff/Petitioner attempted to rectify. Moreover, Plaintiff/Petitioner could have prosecuted the suit in Galveston Division as plaintiff's choice of forum is significant and usually will not be disturbed.

Defendant/Respondent was not prejudiced by the motion to transfer. Defendant/Respondent had not even been served with process nor filed any answer. In fact, the transfer to the Houston Division would have been more convenient for the Defendant/Respondent and witnesses.

Plaintiff/Petitioner should not lost her day in court because of a possible technical defect in the filing of her suit. Instead of getting relief from the judicial system, Leslie Sundell has been victimized by the actions of the

District Court. The interest of justice was not served by dismissing the case. The District Court abused its discretion by dismissing this case. The Court of Appeals erred in deciding that it had not abused its discretion.

If the district court's judgment is vacated, appellate courts have the authority to transfer the case. Section 1406 does not represent a conscious legislative decision to deny appellate courts authority to transfer cases. *Cox Enterprises, Inc. v. Holt*, 691 F.2d 989, 990 (11th Cir. 1982). Courts of appeals are not required to remand a case to district court for it to enter an order to transfer; rather courts of appeals could transfer a case in the interest of justice. *Cameron v. Thornburgh*, 983 F.2d 253, 257 (D.C. Cir. 1993). In *Bolar v. Frank*, the appellate court held that in accord with the functional purpose of section 1406(a) and in the interest of judicial economy they had the authority to transfer the case directly to the district court to cure a venue defect. 938 F.2d 377, 379-80 (2d Cir. 1991) (per curiam).

A Title VII action was filed by the Appellant in *Minnette v. Time Warner*, 997 F.2d 1023 (2d Cir. 1993). The district court dismissed Minnette's complaint for improper venue. *Id.* That appellate court deemed it appropriate to exercise its "statutory and inherent authority" that the transfer of the case, when the statute of limitations has run, [was] in the interest of justice. *Id.* at 1026-27.

In the case of *Stewart Organizations Inc. v. Ricoh Corp.*, 487 U.S. 22, 30-31 (1988) Court writing, through Justice Marshall, explains "the district court also must weigh in the balance the convenience of the witnesses and those

public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of the 'interest of justice.' "

Plaintiff/Petitioner still believes that transferring the case to the Houston Division would be in the best interests of both parties and witnesses. Since this Court has the authority, the Honorable Court should transfer this case to the Houston Division in the interest of judicial economy and in the interest of justice.

CONCLUSION

In light of the importance to clarify the venue statute for Title VII and the § 1406 provision for transferring a case within divisions of a district, it is prayed that this Court grant the writ of certiorari. In addition, it is prayed that the final judgment entered by the court of appeals be reversed and to save judicial time and resources, this Honorable Court should direct the court of appeals to exercise its authority and transfer this case directly to the Houston Division of the Southern District of Texas.

Date: June 17, 1997

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1996

LESLIE SUNDELL,

Petitioner,

-against-

CISCO SYSTEMS, INC.,

Respondent.

PETITIONER'S, LESLIE SUNDELL'S APPENDIX

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-41191
Summary Calendar

LESLIE SUNDELL,

Plaintiff-Appellant,

VERSUS

CISCO SYSTEMS INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

(G-96-CV-576)

Before JONES, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:**

The appellant, Leslie Sundell, filed suit against Cisco Systems, Inc. in the United States District Court for the Southern District of Texas, *Galveston Division*. A few days after filing such suit, and before service of process upon the defendant or any answer by defendant, counsel for Sundell discovered that he had erroneously drafted the original complaint for filing in the Galveston Division

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** Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

when he had intended to file it in the Houston Division. Several days later, counsel for the appellant filed a motion to transfer the case from the Galveston Division to the Houston Division. The district court denied such motion and dismissed the suit without prejudice.

Under 28 U.S.C. § 1404(b), the district court has broad discretion in deciding whether to transfer a civil action from a division in which it is pending to any other division in the same district. Likewise, under 28 U.S.C. § 1406(a), the district court is directed to dismiss a case which is filed in the wrong division or district for venue purposes or to transfer such case to any district or division in which it could have been properly brought. We read § 1406 as again giving the district court discretion to decide which course of action to follow.

We find nothing in the record of this case upon which we could say the district court abused its discretion. Accordingly, the entry of final judgment without prejudice is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LESLIE SUNDELL	§	
VS.	§	CIVIL ACTION NO.
	§	6-96-576
CISCO SYSTEMS, INC.	§	

FINAL JUDGMENT

For the reasons set forth in the Order issued this date, Plaintiff's Motion for Transfer is DENIED. Furthermore, the case is hereby DISMISSED WITHOUT PREJUDICE. Plaintiff's counsel shall personally bear all costs and expenses incurred herein to date.

THIS IS A FINAL JUDGMENT.

IT IS SO ORDERED.

DONE this 25th day of October, 1996, at Galveston, Texas.

/s/
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LESLIE SUNDELL	§	
VS.	§	CIVIL ACTION NO.
	§	G-96-576
CISCO SYSTEMS, INC.	§	

ORDER

Before the Court is the Plaintiff's Motion to Transfer, filed on October 18, 1996. For the reasons set forth below, the Motion is DENIED, and the case is DISMISSED WITHOUT PREJUDICE.

Plaintiff files the current Motion to Transfer to remedy what appears to be a ridiculous clerical error that occurred in Plaintiff counsel's own office. In the instant Motion, Plaintiff's counsel explains that he had intended to file the Plaintiff's complaint in the Houston Division. Notwithstanding that lofty intention, when he prepared his Original Complaint, counsel instead named the Galveston Division in the caption of the lawsuit. Thus, when Mr. Griffin's office staff filed the case, they did so in the Galveston Division. The Court notes with genuine regret that this is yet another astonishing example of the pervasive professional indifference exhibited by this attorney over the past couple of years. In this case, counsel's blunder has caused unnecessary time and expense to be spent by the Clerk's Office, which is already burdened with the management of one of the largest civil dockets in the United States. The Clerk's Office must docket every

new filing, create a file, schedule a Rule 16 Conference, issue appropriate documentation for service of process, and perform various other administrative tasks for each and every new cause of action filed in this Court. These tasks are carried out diligently and immediately. Therefore, counsel's mistake has already costs [sic] the Clerk's Office valuable time and energy in processing a filing which, with even nominal supervision of his staff and even perfunctory proofreading, counsel could have easily spared this Court. Now, counsel blithely asks for the use of further resources of this Court in filing the current Motion to Transfer, as though this Court and its staff should be responsible for the correction of genuinely idiotic mistakes. The Court absolutely refuses to waste anymore of the Clerk's time in this matter. Therefore, the Plaintiff's Motion to Transfer is hereby DENIED, and the case is DISMISSED WITHOUT PREJUDICE. Any costs incurred herein to date shall be borne by Plaintiff's counsel personally.

IT IS SO ORDERED.

DONE this 25th day of October, 1996, at Galveston, Texas.

/s/
SAMUEL B. KENT
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LESLIE SUNDELL,
PLAINTIFF

VS. CIVIL ACTION NO. G-96-576

CISCO SYSTEMS, INC.
DEFENDANT

PLAINTIFF'S, LESLIE SUNDELL'S,
MOTION TO TRANSFER

Plaintiff, Leslie Sundell, files this Motion to Transfer, *prior to service or answer,* of the original complaint in this matter and would show unto the Court as follows:

1) This matter should more properly be filed/docketed in the Houston Division of the Southern District of Texas in that the Plaintiff was employed in the Defendant's Clear Lake City Office, located in Harris County, Texas. The only tangential connection with Galveston County is the Plaintiff is a resident of the City of Galveston.

2) The caption in the lawsuit was not changed from the Galveston Division to the Houston Division in the computer and when the lawsuit was filed by office personnel, it was brought to the attention of personnel that the case is a Houston Division lawsuit, not a Galveston Division case. The undersigned then attempted to apprise the Clerk's office of the mistake and was told that administratively it would be more efficient to file a motion to transfer the matter – thus this motion.

It is prayed that this matter be transferred to the Houston Division of the Southern District of Texas.

DATE: October 18, 1996

Respectfully submitted,

/s/

ANTHONY P. GRIFFIN
ATTORNEY-IN-CHARGE

STATE BAR NO. 08455300
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